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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

SIMON PROVENCIO ALFARO et al.,

Defendants and Appellants.

C060009

(Super. Ct. Nos.  
SF107256A/SF107256B)

Defendants Simon Provencio Alfaro and Victor Provencio Alfaro<sup>1</sup> were charged with robbery.<sup>2</sup> Additionally, Victor was charged with the enhancement of personal use of a firearm and Simon was charged with the enhancement of being armed with a firearm during a felony. After a jury trial, defendants were

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<sup>1</sup> Because defendants have the same surname, to avoid confusion and with no disrespect, we will refer to them as Simon and Victor throughout the remainder of this opinion.

<sup>2</sup> Defendants were also charged with street terrorism and possession of a dangerous weapon but the prosecutor later dismissed those charges.

each convicted of robbery and the associated firearm enhancement allegations were found to be true.

On appeal, Victor argues he received ineffective assistance of counsel because his trial counsel failed to request that the jury be further admonished about an August 3, 2007, uncharged offense. Victor also contends there is no substantial evidence to support his firearm enhancement.

Simon argues on appeal that the trial court violated his right to due process of law and a fair trial when it: (1) did not adequately admonish the jury as to the incident of August 3, 2007; and (2) refused to allow his trial counsel to read from a treatise during closing argument.

Both defendants argue their right to a fair trial was violated when, outside the presence of the jury, the trial court made inappropriate and disparaging references to them. We affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

After work on August 1, 2007, Miguel Lopez Ortiz<sup>3</sup> walked to the Western Union on Charter Way in Stockton to send money to Mexico. As Lopez left the Western Union, he noticed a red GMC van parked in the area with a license plate starting with the number 5, and three people inside. Lopez crossed the street and the van followed him for two blocks. At the intersection of Jackson and Van Buren, Victor and Simon got out of the van and

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<sup>3</sup> The parties refer to the victim as Lopez. We will refer to him as Lopez as well.

approached Lopez. Victor stood in front of Lopez and Simon was behind him. Victor told Lopez "give me the cash" and showed Lopez the gun in his pocket. Lopez also noticed Simon had what appeared to be the outline of a handgun in his pocket. The display of the guns scared Lopez and he removed money from his wallet and handed it to Victor. At trial, Lopez described the gun Victor had as a .45-caliber handgun with a chrome top. Lopez saw approximately four to five inches of the gun because Victor had the gun in his pocket and was covering it partly with a shirt that was wrapped around his hand.

At approximately 5:15 p.m. on August 3, 2007, Telesfordo Zuniga was sitting inside his truck at his home on San Juan Avenue in Stockton and saw a red van stop in front of his house. Two young men got out of the van and ran. Police officers came shortly thereafter in response to dispatch notifying them that a witness was following a vehicle that was involved in a robbery and ended up in that area.

The two young men were identified as Victor and Eduardo Moreno. Officer Richard Hamblin found the two young men sitting on a porch, out of breath, sweating, and very nervous. When Officer Hamblin attempted to question Victor, Victor initially said he was walking around the neighborhood all day. After Officer Hamblin conducted a field "showup," he reapproached Victor and let him know he had been identified by a witness as being in the van. Victor responded: "'I'm sorry for lying, I got nervous, I was in the vehicle.'" Officer Hamblin then informed Victor that he was identified as being one of the

suspects in a beating and robbery of a farmworker that happened that day. Victor responded, "'It just happened. I don't know.'" Simon was not implicated in this incident and Victor was not charged with any offense that occurred on August 3, 2007.

Defendants were charged and tried for the robbery of Lopez. The trial court admitted the evidence of the uncharged August 3 offense to prove identity as to Victor only. There is no dispute the trial court specifically considered the potential prejudicial effect of admitting testimony regarding the August 3 incident and determined it was outweighed by the probative value of the evidence to show identity under Evidence Code sections 352 and 1101.

Three witnesses testified regarding the August 3 incident, and the trial court admonished the jury about each witness's testimony. After the testimony of Telesfordo Zuniga, the trial court admonished the jury, "This testimony is directed only towards Victor Alfaro, not Simon Alfaro." Prior to the testimony of Officer Hamblin, the trial court admonished the jury, "The testimony is related as . . . to Victor Alfaro only." Again the trial court admonished the jury before Officer Sidney Siv testified that the testimony "is also directed just towards Victor Alfaro."

The trial court also read the jury instructions on: evidence (CALCRIM No. 222), multiple defendants and the limited admissibility of evidence (CALCRIM No. 304), and evidence of defendant's statements (CALCRIM No. 358). At the end of these

instructions and before the trial court continued instructing the jury, Victor's counsel objected. After a conference at the bench, the trial court excluded all of the testimony about the August 3 incident.

Additional facts appear where necessary in the Discussion, below.

## DISCUSSION<sup>4</sup>

### I

#### *Admissibility Of Uncharged Offense And Jury Admonition (Simon)*

Simon claims the trial court failed to protect his right to a fair trial "free of irrelevant and prejudicial evidence" because a reasonable juror could have used the testimony regarding the uncharged August 3 incident to convict him of the August 1 robbery.

"The trial court is vested with wide discretion in determining the relevance of evidence." (*People v. Babbitt* (1988) 45 Cal.3d 660, 681; see Evid. Code, § 210.) We review rulings to admit or exclude evidence for abuse of discretion and will reverse only if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438.) "[D]iscretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered.'" (*People v. Green* (1995)

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<sup>4</sup> Victor joins in all arguments made by Simon that may be beneficial to Victor. (Cal. Rules of Court, rule 8.200(a)(5).)

34 Cal.App.4th 165, 182-183.) The trial court did not abuse its discretion in allowing the evidence.

Simon argues that he was prejudiced because the jurors were not adequately instructed they could not use the evidence of the August 3 incident against him. This argument lacks merit because the trial court did admonish the jury that the evidence of the August 3 incident was relevant only to Victor.

Simon correctly points out that Evidence Code section 355 states, "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly." The trial judge followed this rule by admonishing the jury before or after each of the three witnesses who testified to the August 3 incident that the testimony was relevant only to Victor. The trial court also instructed the jury prior to deliberation that certain evidence was admitted only against a certain defendant and that it must not consider that evidence against any other defendant. (CALCRIM No. 304.)

We presume jurors are intelligent and capable of understanding and correlating all jury instructions given. (*People v. Holt* (1997) 15 Cal.4th 619, 662, citing *People v. Delgado* (1993) 5 Cal.4th 312, 331.) We also presume the jurors follow the jury instructions given to them. (*Holt*, at p. 662.) The trial court not only adequately admonished the jury during each witness's testimony, but adequately instructed the jury at the close of evidence that any evidence as to the August 3

incident pertained to Victor only. Furthermore, since the trial court ultimately excluded all of the testimony about the August 3 incident from the jury's consideration, we do not doubt the jury was able to follow these instructions and admonitions. In short, this body of evidence did not exist as far as the jury was concerned when it deliberated.

## II

### *No Ineffective Assistance Of Counsel (Victor)*

On appeal, Victor claims the trial court improperly allowed his statement made as to the uncharged August 3 offense to show identity under Evidence Code section 1101 and the failure of his trial counsel to request that the jury be further admonished to disregard Victor's statement denied Victor the right to effective assistance of counsel. We disagree.

Before the jury deliberated, the trial court instructed the jury to disregard all of the testimony about the August 3 incident. As with Simon, this body of evidence did not exist as far as the jury was concerned when it deliberated.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that defendant suffered prejudice as a result. (*In re Wilson* (1992) 3 Cal.4th 945, 950.) To establish prejudice, a defendant must demonstrate a reasonable probability that the result of the proceedings would have been more favorable to him but for counsel's error. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694 [80 L.Ed.2d 674, 697-698].) A reviewing

court need not address whether counsel's performance was deficient if defendant does not show prejudice. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1123.) Victor does not show he was prejudiced.

Even without the identity evidence from the uncharged incident, the victim of the August 1 robbery identified Victor as one of the men who robbed him. Because there was already testimony as to the identity of Victor in the charged offense, he has not shown a reasonable probability that the result of the proceedings would have been more favorable to him. (See *Strickland v. Washington*, *supra*, 466 U.S. at pp. 693-694 [80 L.Ed.2d at pp. 697-698].) Victor claims the in-court identification of him by Lopez was flawed. Witness credibility issues and evidentiary conflicts are matters for the jury to decide, however, not this court. (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Victor's claim of ineffective assistance of counsel fails.

### III

#### *Reading From A Treatise In Closing Argument (Simon)*

Simon argues on appeal that the trial court violated his rights to due process and a fair trial when it refused to allow his trial attorney to read from a treatise concerning the unreliability of eyewitness identification during closing argument. Simon claims that his counsel "simply desired to read the opinions of well-known persons, including judicial lions Jerome Frank and Felix Frankfurter regarding a straight-forward



matter of common knowledge . . . ." (Fns. omitted.) We disagree.

It is well established that "a criminal defendant has a constitutional right to have counsel present closing argument to the trier of fact." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1184, citing *Herring v. New York* (1975) 422 U.S. 853, 856-862 [45 L.Ed.2d 593, 597-601].) A trial court, however, has broad discretion and great latitude in controlling the duration and limiting the scope of closing arguments. (*Herring*, at p. 862 [45 L.Ed.2d at p. 600].)

When the prosecution objected to Simon's counsel reading the treatise in closing summation, the trial court stopped the proceedings to hear argument on the issue. Simon's trial attorney could not provide the name of the author or title of the treatise. Simon contends the treatise merely "quoted experts in the field regarding those well-known dangers" of eyewitness identification. The text of the treatise, however, went beyond quoting experts and instead explained what a Pennsylvania court found in a particular case.

The trial court appropriately found that Simon's trial attorney could have put an expert on the stand to explain the unreliability of eyewitness identification and the expert would then have been subject to cross-examination. Simon's trial attorney, however, tried to introduce unsound expert testimony to the jury through closing argument instead of through evidence. This was not legitimate closing argument as it denied the People's right to cross-examine the expert. Furthermore, if

the unreliability of eyewitness identification is a "straight-forward matter of common knowledge," as Simon claims, then his trial counsel did not need to read from a treatise to explain it.

The trial court rationally concluded that Simon's trial counsel attempted to present expert testimony by reading a treatise during closing argument and precluded him from doing so. The trial court did not abuse its discretion.

#### IV

##### *Evidence To Support Firearm Enhancement (Victor)*

Victor claims there is insufficient evidence to support the jury's finding that he personally used a firearm in the commission of the robbery of Lopez. We disagree.

The test for sufficiency of the evidence to support an enhancement is whether, after viewing the evidence in the light most favorable to the judgment, any rational trier of fact could have found the elements of the enhancement beyond a reasonable doubt. (*People v. Alvarez* (1996) 14 Cal.4th 155, 224-225 [personal use of a deadly weapon].)

The trial court instructed the jury with CALCRIM No. 3146, as follows, "Someone personally uses a firearm if he or she intentionally does any of the following: [¶] (1) Displays the weapon in a menacing manner; [¶] (2) Hits somebody with the weapon; [¶] (3) Or fires the weapon."

Victor cites *People v. Jacobs* (1987) 193 Cal.App.3d 375 to show that his case falls within "those in which the gun was held or exposed in a menacing fashion accompanied by words

threatening a more violent use.'" Specifically, Victor emphasizes that cases in this category "'require some type of display of the weapon, coupled with a threat to use it which produces fear of harm in the victim before there can be a use.'" (Italics omitted.) Victor, however, omits a footnote that indicates the above statement is similar to the facts of *People v. Colligan* (1979) 91 Cal.App.3d 846 "in which a suspect displayed the handle of a gun protruding from his waistband and said he had a gun and did not want to use it." (*Jacobs*, at p. 381, fn. 2.) This is comparable to the present case.

Similar to *Colligan*, Lopez testified Victor told him "give me the cash," as Victor stood in front of him with his hand over his pocket on his pants, showing Lopez the gun in his pocket. (See *People v. Colligan*, *supra*, 91 Cal.App.3d at p. 849.) Lopez saw approximately four to five inches of Victor's gun and was able to describe it as a .45-caliber handgun with a chrome top. Lopez testified that Victor's display of the gun when he demanded the money was what scared Lopez and caused him to remove the money from his wallet and hand it to Victor.

This is enough evidence for the jury to find beyond a reasonable doubt that Victor "[d]isplay[ed] the weapon in a menacing manner." (See CALCRIM No. 3146.) Therefore, there is substantial evidence to support the jury's conclusion that Victor personally used a firearm in the commission of the robbery of Lopez.

*Inappropriate And Disparaging References About Defendants*

Defendants argue on appeal that the trial judge, K. Peter Saiers, violated their constitutional rights to due process of law and a fair trial, when out of the presence of the jury, he referred to defendants as "lazy assholes."

On May 20, 2008, after the close of evidence and outside the presence of the jury, the trial attorneys and Judge Saiers discussed jury instructions. Both defendants waived their presence at the conference. While discussing with counsel whether both defendants faced mandatory prison terms for the robbery, Judge Saiers remarked: "These goddamned guys, preying on their countrymen who come up here and work their asses off. These lazy assholes. Jesus Christ."<sup>5</sup>

Canon 3(B)(4) of the California Code of Judicial Ethics, as amended on April 29, 2009, states: "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity . . . ." Canon 1 of the California Code of Judicial Ethics requires a judge to act at all times in a manner that

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<sup>5</sup> Judge Saiers's use of inappropriate language was even more pervasive. During trial and outside the presence of the jury, Judge Saiers remarked to Simon's trial attorney, "You take a paranoid pill this morning or something?" in reference to her repeated request that certain evidence be excluded. Judge Saiers also repeatedly referred to defendants as "Pip" and "Squeak" outside the presence of the jury, apparently because of their diminutive stature.

promotes public confidence in the integrity and impartiality of the judiciary. "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards that the integrity and independence of the judiciary will be preserved." Judge Saiers's use of profanity and demeaning terms when describing defendants violated these canons. He was neither dignified nor respectful of defendants and his comments degraded the integrity of the judicial branch and diminished confidence in the court.

Doubtless, Judge Saiers engaged in judicial misconduct, but that does not end our inquiry. However reprehensible Judge Saiers's comments were, they require reversal of defendants' convictions only if the comments were made in front of the jury.<sup>6</sup> (See *Etzel v. Rosenbloom* (1948) 83 Cal.App.2d 758, 759-762.) Indeed, "[o]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comment would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendants] a fair, as opposed to a perfect,

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<sup>6</sup> See *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 786-789, for examples of judicial misconduct in the presence of a jury.

trial.”<sup>7</sup> (*United States v. Pisani* (2d Cir. 1985) 773 F.2d 397, 402; see *People v. Guerra* (2006) 37 Cal.4th 1067, 1112.)

Although Judge Saiers’s comments were incomprehensible and reprehensible, they did not prejudice defendants because defendants have not shown “the jury was influenced in rendering its verdict.” (*Etzel v. Rosenbloom, supra*, 83 Cal.App.2d at p. 762.) Although inappropriate remarks by the trial judge in front of the jury may “deflect the minds of jurors from the evidence actually before them and cause them to reach conclusions based upon feeling, bias, and prejudice, rather than upon the evidence which has been properly received and from which alone they should arrive at verdicts under the law,” that is not relevant here because there is no evidence Judge Saiers made any inappropriate comments in the presence of the jury. (*People v. Williams* (1942) 55 Cal.App.2d 696, 703.)

Not only do defendants fail to point to any inappropriate statements or rulings by Judge Saiers in front of the jury, they also fail to raise any objection to the sentence they received based on judicial bias or misconduct. Thus, defendants have failed to meet their burden to show Judge Saiers’s misconduct prejudicially deprived them of their due process right to a fair trial.

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<sup>7</sup> The decision on whether a judge should be disciplined for judicial misconduct lies with the Commission on Judicial Performance. Our role is to determine only whether defendants show prejudicial error.

DISPOSITION

The judgment is affirmed. The clerk of the court is directed to transmit a copy of this opinion to the Commission on Judicial Performance.

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ROBIE, J.

We concur:

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NICHOLSON, Acting P. J.

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BUTZ, J.